



UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ROY ALAN O'GUINN,

Plaintiff,

vs.

SENIOR CORRECTIONAL OFFICER  
TIMOTHY TOOKER, *et al*,

Defendants.

3:09-cv-00684-RCJ-RAM

ORDER

Plaintiff Roy O'Guinn has submitted an amended civil rights complaint pursuant to 42 U.S.C. § 1983, as directed by the court. The Court has screened Plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A and finds the amended complaint should be served.

**I. Screening Standard Under 28 U.S.C. § 1915A**

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that

1 a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged  
2 violation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42,  
3 48 (1988).

4 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation  
5 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of  
6 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may  
7 be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.  
8 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is  
9 provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under  
10 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses  
11 a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions  
12 as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could  
13 not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

14 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*  
15 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim  
16 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that  
17 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making  
18 this determination, the Court takes as true all allegations of material fact stated in the complaint, and the  
19 Court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d  
20 955, 957 (9th Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than  
21 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404  
22 U.S. 519, 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed  
23 factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp.*  
24 *v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic recitation of the elements of a cause of action  
25 is insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

1           Additionally, a reviewing court should “begin by identifying pleadings [allegations] that, because  
2 they are no more than mere conclusions, are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*,  
3 129 S.Ct. 1937, 1950 (2009). “While legal conclusions can provide the framework of a complaint, they  
4 must be supported with factual allegations.” *Id.* “When there are well-pleaded factual allegations, a  
5 court should assume their veracity and then determine whether they plausibly give rise to an entitlement  
6 to relief. *Id.* “Determining whether a complaint states a plausible claim for relief [is] a context-specific  
7 task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

8           Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the  
9 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal  
10 conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of  
11 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual  
12 allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28  
13 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

## 14   **II.    The Complaint**

15           Plaintiff alleges that his due process rights, guaranteed by the Fourteenth Amendment, have been  
16 violated by disciplinary proceedings based upon evidence that was held in the Lovelock Correctional  
17 Center evidence locker since July of 2004. He contends that the charging officer, Senior Correctional  
18 Officer Tooker of LCC, the disciplinary hearing officer, Lt. Arguello, and Warden Gregory Smith, both  
19 at Nevada State Prison brought the charges and then denied him a fair hearing and review, causing him  
20 to suffer an extended time in disciplinary segregation and a loss of good time credits leading to mental  
21 anguish and confusion.

22           Plaintiff tells that he was charged with an MJ 26 in 2004 with possession of a book which had  
23 been modified. Those charges were dismissed, but the book was held in the LCC evidence locker since  
24 that time until plaintiff was about to be released from an eighteen month stint in disciplinary segregation  
25 arising from other events. Plaintiff alleges that just before his release from disciplinary segregation,  
26

1 Senior Correctional Officer Tooker filed a notice of charges for an MJ-53 based on his purported  
2 discovery of "a crystalline substance that had been logged into the LCC Evidence vault on 8-5-04."  
3 Plaintiff notes that the charges in 2004 were for possession of contraband excluding drugs and drug  
4 paraphernalia and that the book had been thoroughly examined by the investigations department at that  
5 time and no drugs had been found at that time. Plaintiff identifies himself as brain-damaged and  
6 seriously mentally ill. Plaintiff further alleges that while defendant Arguello asked if he needed counsel,  
7 when he said yes, none was provided. Finally, plaintiff asserts that there was no evidence presented to  
8 the hearing officer to support the charges or the guilty finding.

9 Plaintiff contends that on appeal, the warden improperly upheld the guilty finding and sanctions  
10 when there was no evidence to support the charges and that a proper investigation and review of the  
11 events from 2004 would have shown that the book did not contain any drugs and that SC/O Tooker's  
12 charges were false.

13 In order to state a cause of action for deprivation of procedural due process, a plaintiff must first  
14 establish the existence of a liberty interest for which the protection is sought. In *Sandin v. Connor*, 515  
15 U.S. 472, 487 (1995), the Supreme Court abandoned earlier case law which had held that states created  
16 protectable liberty interests by way of mandatory language in prison regulations. *Id.* Instead, the Court  
17 adopted an approach in which the existence of a liberty interest is determined by focusing on the nature  
18 of the deprivation. *Id.* In doing so, the Court held that liberty interests created by prison regulations are  
19 limited to freedom from restraint which "imposes atypical and significant hardship on the inmate in  
20 relation to the ordinary incidents of prison life." *Id.* at 484.

21 Where a protected liberty interest exists, the Supreme Court has set out the following procedural  
22 due process requirements for disciplinary detention of a prisoner: (1) written notice of the charges; (2)  
23 at least 24 hours between the time the prisoner receives written notice and the time of the hearing, so that  
24 the prisoner may prepare his defense; (3) a written statement by the fact finders of the evidence they rely  
25 on and reasons for taking disciplinary action; (4) the right of the prisoner to call witnesses in his defense,

1 when permitting him to do so would not be unduly hazardous to institutional safety or correctional goals;  
 2 (5) legal assistance to the prisoner where the prisoner is illiterate or the issues presented are legally  
 3 complex. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). “[T]he requirements of due process are  
 4 satisfied if some evidence supports the decision by the prison disciplinary board. *Superintendent, Mass.*  
 5 *Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985); *Burnsworth v. Gunderson*, `79 F.3d 771, 774-75  
 6 (9<sup>th</sup> Cir. 1999) (where there is no evidence of guilt, it may be unnecessary to demonstrate existence of  
 7 a liberty interest).

8 Furthermore, if the inmate is illiterate, the issues are complex, or the prisoner is unable to gather  
 9 evidence, the prisoner must be provided with some legal assistance. *See Vitek v. Jones*, 455 U.S. 480,  
 10 495-96 (1980); *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976); *Walker v. Summner*, 14 F.3d 1415,  
 11 1420 (9<sup>th</sup> Cir. 1994).

12 Here, plaintiff alleges and the Court must take as true, that there was no evidence presented at  
 13 the disciplinary hearing to support the charges and that he was entitled to some counsel to assist him at  
 14 the hearing and, as a result, plaintiff has stated claims which may proceed against the named defendants.

15 **IT IS THEREFORE ORDERED** as follows:

16 1. The Clerk **shall electronically serve a copy of this order, including the attached**  
 17 **Notice of Intent to Proceed with Mediation form, along with a copy of plaintiff’s amended**  
 18 **complaint, on the Office of the Attorney General of the State of Nevada, to the attention of Pamela**  
 19 **Sharp.**

20 2. The Attorney General’s Office shall advise the Court within **twenty-one (21) days** of the  
 21 date of entry of this order whether it can accept service of process for the named defendants. As to any  
 22 of the named defendants for which the Attorney General’s Office cannot accept service, the Office shall  
 23 file, *under seal*, the last known address(es) of those defendant(s).

24 ///

25 ///

1           3.       If service cannot be accepted for any of the named defendant(s), plaintiff shall file a  
2 motion identifying the unserved defendant(s), requesting issuance of a summons, and specifying a full  
3 name and address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the Federal  
4 Rules of Civil Procedure, service must be accomplished within one hundred twenty (120) days of the  
5 date the complaint was filed.

6           4.       If the Attorney General accepts service of process for any named defendant(s), such  
7 defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days**  
8 following the date of the early inmate mediation. If the court declines to mediate this case, an answer  
9 or other response shall be due within **thirty (30) days** following the order declining mediation.

10          5.       The parties **SHALL DETACH, COMPLETE AND FILE** the attached Notice of Intent  
11 to Proceed with Mediation form on or before **thirty (30) days** from the date of entry of this order.

12           DATED: November 16, 2010.

13  
14   
15 UNITED STATES MAGISTRATE JUDGE  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Name \_\_\_\_\_

Prison Number (if applicable) \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\_\_\_\_\_, )  
Plaintiff, )  
v. )  
\_\_\_\_\_)  
\_\_\_\_\_)  
Defendants. )  
\_\_\_\_\_)

Case No. \_\_\_\_\_

NOTICE OF INTENT TO  
PROCEED WITH MEDIATION

This case may be referred to the District of Nevada's early inmate mediation program. The purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by which the parties meet with an impartial court-appointed mediator in an effort to bring about an expedient resolution that is satisfactory to all parties.

1. Do you wish to proceed to early mediation in this case? \_\_\_\_ Yes \_\_\_\_ No

2. If no, please state the reason(s) you do not wish to proceed with mediation? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. List any and all cases, including the case number, that plaintiff has filed in federal or state court in the last five years and the nature of each case. (Attach additional pages if needed).

\_\_\_\_\_

1 \_\_\_\_\_  
2 \_\_\_\_\_  
3 4. List any and all cases, including the case number, that are currently pending or any pending  
4 grievances concerning issues or claims raised in this case. (Attach additional pages if needed).  
5 \_\_\_\_\_  
6 \_\_\_\_\_  
7 \_\_\_\_\_

8 5. Are there any other comments you would like to express to the court about whether this case is  
9 suitable for mediation. You may include a brief statement as to why you believe this case is suitable for  
10 mediation. (Attach additional pages if needed).  
11 \_\_\_\_\_  
12 \_\_\_\_\_  
13 \_\_\_\_\_

14 This form shall be filed with the Clerk of the Court on or before thirty (30) days from the date  
15 of entry of this order.

16 Counsel for defendants: By signing this form you are certifying to the court that you have  
17 consulted with a representative of the Nevada Department of Corrections concerning participation in  
18 mediation.

19 Dated this \_\_\_\_ day of \_\_\_\_\_, 2010.  
20

21 \_\_\_\_\_  
22 Signature

23 \_\_\_\_\_  
24 Name of person who prepared or  
25 helped prepare this document  
26